

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Courts-Martial Processing Times

Average processing times for general courts-martial and bad-conduct discharge special courts-martial for which records of trial were received by the Army Judiciary during the fourth quarter of Fiscal Year 1997 are shown below. For comparison, the times for the previous quarters are also shown below.

General Courts-Martial

	1Q, FY 97	2Q, FY 97	3Q, FY 97	4Q, FY 97
Records received by Clerk of Court	169	192	174	177
Days from charges or restraint to sentence	66	63	71	68
Days from sentence to action	86	94	93	85
Days from action to dispatch	7	11	9	10
Days en route to Clerk of Court	11	9	9	12

BCD Special Courts-Martial

	1Q, FY 97	2Q, FY 97	3Q, FY 97	4Q, FY 97
Records received by Clerk of Court	42	35	34	45
Days from charges or restraint to sentence	56	38	43	39
Days from sentence to action	83	82	69	68
Days from action to dispatch	5	15	6	12
Days en route to Clerk of Court	11	8	7	11

Courts-Martial and Nonjudicial Punishment Rates

Courts-martial and nonjudicial punishment rates for the fourth quarter of fiscal year 1997 are shown below. The figures in parentheses are the annualized rates per thousand. The rates are based on an average strength of 485,377.

	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
GCM	0.36 (1.43)	0.33 (1.31)	0.80 (3.21)	0.18 (0.71)	0.84 (3.34)
BCDSPCM	0.18 (0.73)	0.18 (0.73)	0.29 (1.17)	0.07 (0.27)	1.25 (5.01)
SPCM	0.01 (0.02)	0.01 (0.02)	0.00 (0.00)	0.02 (0.09)	0.00 (0.00)
SCM	0.24 (0.95)	0.28 (1.12)	0.11 (0.44)	0.13 (0.53)	0.42 (1.67)
NJP	22.75 (91.00)	24.33 (97.32)	19.77 (79.10)	23.79 (95.18)	14.62 (58.46)

Litigation Division Note

Sixth Circuit Rules on Title VII Compensatory Damage Cap¹

On 4 December 1997, the United States Court of Appeals for the Sixth Circuit ruled that the Title VII compensatory damage cap is a limit on the amount of recovery possible for an entire lawsuit.² The Sixth Circuit was the first appellate court to rule on the issue³ and held that a plaintiff who alleged discrimination under Title VII could not recover the statutory maximum of \$300,000 in compensatory damages for each different claim or basis of discrimination presented in the lawsuit.⁴

The court noted that whether the statutory cap applies on a “per claim” or a “per lawsuit” basis was purely a matter of statutory construction,⁵ and the plain meaning of the statute is conclusive.⁶ Under the plain language of the statute, the cap on compensatory damages applies to each complaining party in an “action.”⁷ An “action” is simply a “lawsuit brought in court.”⁸ The court flatly rejected the notion that an action refers to each different basis for a discrimination complaint, whether the basis is race, color, religion, sex, or national origin.

Although the Equal Employment Opportunity Commission (EEOC) general counsel advocated a “per claim” cap in an

amicus curiae brief filed in the Eleventh Circuit,⁹ the court declined to defer to the EEOC position. The court noted that “such deference is only appropriate with respect to ambiguous language The EEOC’s interpretation is entitled to no deference when its position is at odds with the plain language of the statute.”¹⁰

Finally, the court also refused to accept the appellant’s argument that a per lawsuit cap will encourage plaintiffs to file multiple lawsuits in order to circumvent the limitation. Consolidation of actions under the federal Rules of Civil Procedure and doctrines such as res judicata will prevent such multiplicity,¹¹ particularly for actions that arise out of the same core facts. Major Berg.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated

1. This note follows-up on a previous note which outlined the issues involved in greater detail. See, Litigation Division Note, What is a Case Worth? How to Defend the \$300,000 Cap on Compensation Damages in Title VII Suits, ARMY LAW., Mar. 1997, at 30.

2. Hudson v. Reno, No. 96-5232, 1997 U.S. App. LEXIS 34059 (6th Cir. Dec. 4, 1997).

3. The Eleventh Circuit was presented with the same issue in *Reynolds v. CSX Transportation, Inc.*, but the court declined to address the issue and decided the case on other grounds. 115 F.3d 860 (11th Cir. 1997).

4. Hudson, 1997 U.S. App. LEXIS 34059, at *21.

5. The relevant portion of Title VII provides: “In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5 or § 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory . . . damages as allowed in subsection (b) of this section” 42 U.S.C. § 1981a(a)(1) (1994). Subsection (b)(3) of the statute provides:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . awarded under this section, shall not exceed, for each complaining party—

. . . .

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

Id. § 1981a(b)(3).

6. Hudson, 1997 U.S. App. LEXIS 34059, at *16.

7. *Id.*

8. *Id.*, quoting BLACK’S Law Dictionary 18 (6th ed. 1990).

9. Reynolds v. CSX Transp., Inc., 115 F.3d 860 (11th Cir. 1997).

10. Hudson, 1997 U.S. App. LEXIS 34059, at *20.

11. *Id.* at *21.

Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 3, is reproduced in part below.

Update on Lead-Based Paint in the Soil

The issue of lead-based paint in the soil has caused a considerable controversy between the Environmental Protection Agency (EPA), states, and the Department of Defense. The problem arises when lead-based paint that has been applied to the exterior of a building flakes off during the normal weathering process and deposits in the soil around the building. The problem often comes to light during the transfer of property at base realignment and closure (BRAC) sites. The issue typically has been raised through non-concurrences on draft findings of suitability to transfer (FOSTs) and findings of suitability to lease (FOSLs) under the recently-enacted early transfer authority.¹² The issue has also been raised with EPA approval of records of decision (RODs) at national priority list sites.

The regulators' position is that the soil surrounding buildings should be cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹³ This cleanup would include soils around all types of buildings, from residential to industrial. The Army position, however, is that lead-based paint in the soil is not actionable under the CERCLA and should instead be addressed under the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X).¹⁴ Title X applies only to residential buildings that are considered target housing.¹⁵ Target housing is generally defined as residential housing constructed before 1978.¹⁶

The controversy recently reached a new level when the State of Indiana, dissatisfied with the Army's approach to lead-based paint at Fort Benjamin Harrison, invoked dispute resolution procedures under the Department of Defense and State Memorandum of Agreement (DSMOA).¹⁷ While some question whether the DSMOA is an appropriate mechanism to address the issue, talks are progressing with the state in hopes of reach-

ing a solution. This new approach to the lead-based paint issue could be used at other installations.

Until this issue is settled, Army installations should continue to follow current Army policy. At BRAC sites where the EPA non-concurs on a FOST or FOSL, the comment should be attached as an unresolved comment and processed through normal Army channels. The DOD Policy on Lead-Based Paint at Base Realignment and Closure Properties¹⁸ remains in effect. Transferees will continue to be notified of the lead-based paint issue, and the requirement to abate will generally be passed on to the transferee. At sites where an ROD or the section 334 process is contemplated, installations should not agree to do any sampling or remediation of soils without approval from the major command or the Headquarters, Department of the Army. Finally, should a state attempt to invoke the DSMOA process, the installation should contact its major command immediately. Major Polchek.

EPA's Uniform Hazardous Waste Manifest Revisions Project

As of December 1997, the Environmental Protection Agency's (EPA's) Office of Solid Waste began holding meetings to announce the Uniform Waste Manifest Revisions Project.¹⁹ In addition to outlining the strategies that the EPA is considering in an upcoming rulemaking, the EPA is soliciting input on whether its proposed strategies would reduce the burden of the current system. In the meetings, the EPA will explain the constraints the EPA is under in designing a new system and why manifest revisions are needed.

The EPA believes that revisions are necessary to reduce the variability and inefficiencies in the present system and to increase overall effectiveness in tracking hazardous waste.²⁰ The record-keeping burden of the system is high, with a total of 4.8 million hours and \$192,000,000 expended each year in complying with requirements. The EPA estimates that the fed-

12. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 334, 110 Stat. 2422, 2486 (1996).

13. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (1994).

14. Residential Lead-Based Paint Hazard Reduction Act, Pub. L. No. 102-550, 106 Stat. 3897 (1992).

15. *Id.* § 1012.

16. *Id.* § 1004.

17. Letter from Robert Moran, Branch Chief, Project Management Branch, Office of Environmental Response, Indiana Department of Environmental Management, to Lieutenant Colonel Robert Lavoit (Oct. 31, 1997) (copy on file with author).

18. Department of Defense Policy on Lead-Based Paint at Base Realignment and Closure Properties (July 1995), *reprinted in* U.S. DEP'T OF DEFENSE, 4165.66-M, BASE REUSE IMPLEMENTATION MANUAL, app. F-68 (July 1995).

19. This article is based on the first public meeting, which was held by the EPA on 11 December 1997 in Crystal City, Virginia, and on materials provided at that meeting [hereinafter Meeting] (copy on file with author).

20. *Id.*

eral burden is eighty-six percent of the total. Another primary problem with the current system is the patchwork of requirements from state to state. The number of copies, the acquisition process, manifest fees, and submission requirements vary by state. The principal constraints in revising the manifest system are Resource Conservation and Recovery Act ²¹ requirements, Department of Transportation shipping requirements, and state regulatory needs.

The EPA's approach in designing a new manifest system is three-pronged. First, proposed revisions to the manifest form include eliminating many unnecessary data fields and streamlining routing requirements.²² Second, the EPA will study how automation improvements can make the system more effective and efficient.²³ Possible automation improvements include automating the entire manifest cycle, developing electronic signature standards, and allowing electronic storage of records. Third, the EPA will examine possible exemptions from the manifest system.²⁴ Two significant exemptions being considered are the elimination of redundant requirements for generators with multiple sites and elimination of the requirement for full manifests for shipment of recyclables.²⁵

In January 1998, the EPA and three states began a pilot project to test the electronic tracking of the generation, storage, and disposal of hazardous waste.²⁶ The project will test an electronic data exchange system that transfers data electronically from facilities to regulatory agencies.²⁷ The second part of the pilot project will test the electronic signature technology that ensures the integrity and security of the manifests.²⁸ This project will assist the EPA in drafting the rulemaking, which the

EPA expects to propose in October 1998.²⁹ Major Anderson-Lloyd.

Committee Nears Completion of Review of Overseas Environmental Baseline Guidance Document

An interservice committee, comprised of representatives from the military departments, the chairman of the Joint Chiefs of Staff, and the Defense Logistics Agency³⁰ is scheduled to complete a review of the Overseas Environmental Baseline Guidance Document (OEBGD) during the second quarter of fiscal year 1998.³¹ When the OEBGD has been revised, the committee will send the OEBGD to the deputy under secretary of defense for environmental security for coordination, final approval, and distribution.

The OEBGD lays out implementation guidance, procedures, and criteria for environmental compliance at Department of Defense (DOD) installations outside of the United States, its territories, and its possessions.³² Environmental executive agents use the OEBGD to develop the final governing standards to be used by all DOD installations in a particular host nation.³³ The document includes specific DOD environmental criteria which the environmental executive agents must consider. Unless it is inconsistent with applicable host nation law, base rights, status of forces agreements, or other international agreements or practices established pursuant to such agreements, DOD components which are stationed in foreign countries will apply the OEBGD when host nation environmental standards do not exist, are not applicable, or provide less protection to human health and the natural environment than the OEBGD guidance.³⁴ Major Egan.

21. 42 U.S.C.A. §§ 6901-92 (West 1997).

22. Meeting, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Committee membership is determined pursuant to Department of Defense Instruction 4715.5. See U.S. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) [hereinafter DOD INSTR. 4715.5].

31. Memorandum, subject: Overseas Environmental Baseline Guidance Document (OEBGD) Review Committee Meeting Minutes (9 Sept. 1997) (copy on file with author).

32. DOD INSTR. 4715.5, *supra* note 30, para. F.2.

33. Environmental executive agents are appointed by the secretary of defense for host nations where significant DOD installations are located. *Id.* para. F.1.a.

34. DOD INSTR. 4715.5, *supra* note 30, para. 3c(1).